Wong Kim Leng v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42-17-95
KC VOHRAH J
16 OCTOBER 1996

Criminal Law *— Penal Code (Malaysia) — s 420 — Cheating — Whether on the facts the offence was made out*

Criminal Law *— Penal Code (Malaysia) — s 474 — Possession of forged valuable security — Whether on the facts the offence was made out*

Criminal Procedure *— Defence — Alibi — Accused deprived of opportunity to give written notice before introducing evidence in support of alibi — Whether evidence in support of alibi should be allowed — Criminal Procedure Code (FMS Cap 6) s 402A*

On 11 April 1994, the appellant was tried in the sessions court with one charge of cheating under s 420 of the Penal Code (FMS Cap 45) ('the Code') by using a forged credit card to purchase goods from a departmental store and another of being in possession of a forged credit card with intent to pass it off as genuine under s 474 of the Code, both allegedly committed on 15 January 1994. When the trial resumed on 20 September 1994, 10 additional charges of cheating under s 420 of the Code, allegedly committed on 14 January 1994, were added by the deputy public prosecutor. In respect of the 10 charges, the appellant's evidence amounted to evidence in support of an alibi, for which no notice had been given. The trial judge excluded the evidence. The appellant was convicted on all 12 counts. For the original two charges, he was sentenced to three years' imprisonment and one stroke of whipping, and five years' imprisonment and a fine of RM5,000 in default one year's imprisonment respectively. The appellant appealed.

Held, allowing the appeal in part:

(1) The appellant had a conditional right to admit evidence in support of his alibi and the condition was that he had to give a notice in writing to the public prosecutor at least 10 clear days before the commencement of the trial. If the appellant was deprived of the opportunity to give such requisite notice through no fault of his, as in this case, then any trial which ended in evidence in support of the defence of alibi being statutorily barred from being given was clearly unfair and unjust in that it had deprived him of an important right. In the circumstances, the convictions and sentences in respect of the 10 charges had to be set aside and the appeal against the convictions and sentences on these charges was allowed (see p 100G–I).

(2) As for the original two charges, the evidence on which the trial judge relied was overwhelming and her findings of fact on the elements which constituted both the offences were made after a critical evaluation of such evidence. The appellant's defence did

not create any reasonable doubt on the prosecution's case on both the charges. In all the circumstances of the case, there was no reason to disturb the trial judge's findings in the case against the appellant on the first two charges. The sentences imposed were also not excessive. The appellant's conviction on both charges were therefore confirmed and the appeal dismissed (see pp 101F–G, D and 104E–F).

[Bahasa Malaysia summary

Pada 11 April 1994, perayu telah dibicarakan di mahkamah sesyen atas satu pertuduhan menipu di bawah s 420 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut') dengan menggunakan kad kredit palsu untuk membeli barang-barang dari sebuah kedai serbaneka dan satu lagi pertuduhan memiliki kad kredit palsu dengan hasrat menipu dengan menggunakannya sebagai kad sebenar di bawah s 474 Kanun tersebut, dan kedua-duanya dikatakan telah dilakukan pada 15 Januari 1994. Apabila perbicaraan menyambung semula pada 20 September 1994, 10 pertuduhan menipu tambahan di bawah s 420 Kanun tersebut, yang dikatakan telah dilakukan pada 14 Januari 1994, ditambahkan oleh timbalan pendakwa raya. Berhubung dengan 10 pertuduhan itu, keterangan perayu terdiri daripada keterangan yang menyokong alibi, yang mana tiada notis telah diberikan. Hakim perbicaraan mengecualikan keterangan itu. Perayu telah disabitkan atas kesemua 12 pertuduhan. Untuk dua pertuduhan asal, dia telah dihukum pemenjaraan tiga tahun dan sebatan, dan pemenjaraan lima tahun dan denda sebanyak RM5,000 jika ingkar pemenjaraan setahun masing-masing. Perayu membuat rayuan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Perayu mempunyai hak bersyarat untuk memasukkan keterangan yang menyokong alibinya dengan syarat bahawa dia memberi suatu notis bertulis kepada pendakwa raya sekurang-kurangnya 10 hari genap sebelum permulaan perbicaraan. Jika perayu dilucutkan peluang untuk memberi notis yang wajib bukan melalui sebarang kesalahannya, seperti dalam kes ini, maka sebarang perbicaraan yang berakhir dalam keterangan yang menyokong pembelaan alibi dihalang daripada diberikan secara statutori adalah jelas tidak adil dalam ertikata ia melucutkannya daripada suatu hak yang mustahak. Dalam keadaan sedemikian, sabitan dan hukuman berhubung dengan 10 pertuduhan itu harus diketepikan dan rayuan terhadap sabitan dan hukuman atas pertuduhan-pertuduhan ini dibenarkan (lihat ms 100G–I).

(2) Berkenaan dengan dua pertuduhan yang asal, keterangan yang digunakan oleh hakim perbicaraan adalah amat ketara dan pendapat fakta beliau atas unsur yang membentuk kedua-dua kesalahan telah dibuat selepas suatu penilaian keterangan demikian yang kritikal. Pembelaan perayu tidak mewujudkan sebarang keraguan munasabah ke atas kes pihak pendakwa berkaitan dengan kedua-dua pertuduhan. Dalam semua keadaan

kes, tiada apa-apa sebab untuk mengganggu pendapat hakim perbicaraan dalam kes terhadap perayu atas dua pertuduhan pertama. Hukuman yang dikenakan juga tidak melampau. Dengan itu, sabitan perayu atas kedua-dua pertuduhan disahkan dan rayuan ditolak (lihat ms 101F–G, D dan 104E–F).]

Notes

For cases on cheating under s 420, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1260–1277.
For cases on defence of alibi, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1118–1136.

Cases referred to

Ku Lip See v PP [1982] 1 MLJ 194 (refd)
PP v Chew Yoo Choi [1990] 2 MLJ 444 (refd)
PP v Lee Soon Sian [1993] 2 CLJ 214 (refd)
PP v Lim Chen Len [1981] 2 MLJ 41 (refd)
PP v Lim Mun Shaing [1989] 2 CLJ 475 (refd)
PR v Ahmad bin Lateh & Anor [1991] 1 CLJ 71 (refd)
Vasan Singh v PP [1988] 3 MLJ 415 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 113, 402A
Penal Code (FMS Cap 45) ss 420, 474

Appeal from: Kes Tangkap No 62–15–94 (Sessions Court, Kuala Lumpur)

Tan Hock Chuan (*Tan Hock Chuan & Co*) for the appellant.
Shamsul Jafri bin Shafie (Deputy Public Prosecutor) for the respondent.

KC Vohrah J:

Charges added after commencement of trial and the defence of alibi

The trial of the appellant in the sessions court commenced on 11 April 1994. He faced one charge of cheating under s 420 of the Penal Code (FMS Cap 45) ('the Code') and another of being in possession of a forged valuable security with intent to use it as genuine, an offence under s 474 of the Code. The date of the commission of both offences was put as 15 January 1994. The trial went on for some days and when the trial resumed on 20 September 1994, 10 additional charges of cheating under s 420 of the Code allegedly committed on 14 January were added by the deputy public prosecutor. Counsel for the appellant requested for an adjournment as he needed time to serve a notice of alibi. The adjournment was granted.

No notice was, however, served on the public prosecutor. It will be noted that s 402A of the Criminal Procedure Code (FMS Cap 6) ('the CPC') provides that where in any criminal trial the accused seeks to put

forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the public prosecutor at least 10 days before the commencement of the trial. On 20 December 1994 (after an earlier postponement), the trial continued on all 14 charges and SP7 continued giving his evidence. SP7's evidence was essentially in regard to the first two charges. In regard to the 10 remaining charges of cheating allegedly committed on 14 January 1994, SP9 gave evidence implicating the appellant.

In respect of the same 10 charges allegedly committed on 14 January 1994, the defence of the appellant was that, on day of the alleged offences, he was working as a cashier at a hairdressing salon. He did not attempt to call any witnesses to support his defence of alibi; and this is not surprising having regard to *Ku Lip See v PP* [1982] 1 MLJ 194, where it was reiterated that if a trial court — having considered the evidence put forward by the defence — holds that such evidence amounts to evidence in support of an alibi for which no notice has been given, then he has no discretion in the matter but to exclude such evidence.

The sessions judge rejected the defence of alibi; and following the case of *Vasan Singh v PP* [1988] 3 MLJ 412, held that his defence was one of a bare denial that he was at the scene of the alleged offence. She convicted the appellant on all the 10 charges.

It has been decided in *PP v Lim Chen Len* [1981] 2 MLJ 41 that the meaning 'commencement of the trial' appearing in s 402A of the CPC is the commencement of the actual trial itself.

Interestingly, the learned deputy public prosecutor argued that the court should take the trial as comprising two trials, one in regard to the two charges in respect of the offences alleged to have been committed on 15 January 1994 and the other in respect of the offences on 14 January 1994. He argued that the evidence in respect of the offences on 14 January 1994 commenced only with SP9 after the 10 new charges had been added. I cannot agree with the argument. Although there were two sets of charges against the accused, there was only one trial that the accused faced and it would be obviously artificial to say that there were two trials.

What has to be considered is that the appellant had a conditional right to admit evidence in support of his alibi and the condition was that he had to give a notice in writing to the public prosecutor at least 10 clear days before the commencement of the trial. If the appellant was deprived of the opportunity to give such requisite notice through no fault of his, then any trial which ended in evidence in support of the defence of alibi being statutorily barred from being given is clearly unfair and unjust in that it deprived him of an important right. In the circumstances, the convictions and sentences in respect of these 10 charges had to be set aside. The appeal in the circumstances against the convictions and sentences on these 10 charges was allowed.

Original charges of cheating and possession of forged valuable document

As regards the two offences committed on 15 January 1994, the learned judge found the appellant guilty and convicted him on the first amended charge which was that he had cheated Sureshnan a/l Krishnan (SP7) — a

A cashier of Kedai Mun Loong — by deceiving him into believing that Southern Bank Bhd Master Card No 5313–5839–4531–2136 in the name of Soon Seng Kai which he used to pay for some goods worth RM292.80 was genuine and thereby dishonestly induced him to deliver to him the said goods, an offence under s 420 of the Code. He was sentenced to three years' imprisonment and one stroke of the rattan.

B

The learned judge also found the appellant guilty and convicted him on the second charge that he was having in possession a forged valuable security, to wit, a Southern Bank Bhd Master Card Gold No 5414–6883–8919–2502 in the name of Ng Chai Soon, knowing the same to be forged and intending the same to be fraudulently used as genuine, an offence C under s 474 of the Code. He was sentenced to five years' imprisonment and a fine of RM5,000 in default one year's imprisonment, the sentence of imprisonment to run concurrently with the sentence on the first charge.

The learned judge rejected the appellant's defence and found that it did not create any reasonable doubt on the prosecution's case on both the D charges. The appellant's defence from the witness box was that he did not use the credit card P3 at all and that it was one Ah Ming who used it to buy goods at the shop and that after that Ah Ming walked over to him and put the card and a white receipt into the appellant's shirt pocket. Ah Ming then told him to wait there and walked away. He said he had accompanied Ah Ming to the shop as Ah Ming had told him he intended to use credit E cards to buy goods after which he would sell the goods and loan the proceeds of the sale to the appellant who needed money to settle a debt on a car. The appellant said he did not know the two credit cards found on his person were false. He said he did not know where Ah Ming had gone to. He also relied on D18, a cautioned statement made by him and which F appeared to bear out his story.

The evidence on which the learned judge relied was overwhelming and her findings of facts on the elements which constituted both the offences were made after a critical evaluation of such evidence.

The prosecution evidence showed that SP2, the operations supervisor G at Kedai Mun Loong, had observed two men who were using credit cards for the purchase of goods. He suspected that they were using false credit cards and he telephoned the police about his suspicions. In fact, SP2 had seen the appellant go thrice to the payment counter on the second floor to make payment and he also saw him make two payments on the ground floor. SP2 suspected that the credit cards used were not genuine. He H identified the cashier who serviced the appellant on the second floor as Sureshnan (SP7).

SP1 (an inspector), SP3 (a lance corporal) and another policeman went to see SP2 on the second floor of the shop as a result of SP2's call and SP2 then described the two men to them. The three police officers went to I the ground floor and they approached the appellant after SP2 had pointed him out to SP1. As the police were about to arrest the appellant, he ran away and SP3 chased and arrested him after a struggle.

The accused was searched and in his T-shirt pocket were found two credit cards and a receipt. One of the credit cards found was what appeared to be Southern Bank Bhd Master Card No 5313–5839–4531–2136 bearing

the name 'Soon Seng Kai' (P3), the subject matter of the cheating charge, the first charge. In connection with this card was found a Mun Loong Bhd payment receipt No 179 (P5) dated 15 January 1994, which had the time imprinted on it as 15.02, two amounts RM42.90 and RM249.90 and a total payment of RM292.80 with the notation 'Mastercard 5313–5839–4531–2136'. It will be seen that the number of the Master Card noted in the receipt corresponds with the number shown in P3.

The second credit card found in the pocket was Southern Bank Bhd Master Card No 5414–6883–8919–2502 (P2) bearing the name of Ng Chai Soon (P2). This is the subject matter of the second charge, relating to the possession of a forged valuable security.

The evidence was that P3 was used by the appellant to buy goods at Kedai Mun Loong and that the cashier who attended to the appellant was SP7 who was stationed on the second floor and who had identification number 032929 assigned to him. In his evidence, SP7 identified the appellant as the person who used P3 to pay for goods worth RM292.80 at 3.02pm as evidenced by the sales transaction slip P15(1) relating to the use of the credit card. It can be seen the particulars in P3 appearing in P15(1) show, inter alia, with the sales amount a signature and the identification number of SP7. SP7 stated that at the time the credit card P3 was used, he did not know whether it was false or genuine and if he had known that P3 was false he would not have given the goods to the appellant.

SP7 also identified the purchase receipt (P13(1)) amounting to RM292.80 in regard to the transaction covered by the card P3 of which he said he gave a copy to the appellant. It will be noted that P5 found in the shirt pocket of the accused when he was arrested and searched corresponds with a copy of P13(1) as to the date (15 January 1994) and time (15.02), items of goods bought, total cost, card number and the identification number of SP7.

The evidence showed that the credit cards P3 and P2 found on the accused's person, although they were purportedly issued by Southern Bank Bhd were not issued by that bank and neither of the cards bore the name Wong Kim Leng, the appellant's name.

Clearly, both cards were counterfeit cards and one, P3, had been presented to SP7 and used to make payment for goods and SP3 had been deceived into delivering goods to him. The other card was a forged valuable security and the surrounding circumstances clearly showed that he knew it was forged and fraudulently intended the same to be used as genuine.

In attacking the judge's judgment, counsel for the appellant criticized the learned judge for accepting the evidence of SP4 — fraud officer at Hong Kong and Shanghai Banking Corp — as expert opinion and accepting the evidence of SP5 — fraud officer at Southern Bank Bhd — as credible evidence when they stated the credit cards P2 and P3 were forged cards. I fail to understand how the learned judge had erred at all. SP5 gave evidence that although both cards carried the logo of his bank, the Southern Bank Bhd, they had not been issued by his bank. His evidence needed

A nothing more to prove that they were forged but he went on further to explain why he considered the cards to be forged, echoing the evidence of SP3. It was obvious both had considerable experience and expertise on the issue of counterfeit credit cards and their evidence as to why they considered the credit cards were forged, accepted by the learned judge, suffers no infirmity as claimed by the appellant.

B

There is evidence that the cashier SP7 could not identify the appellant at an identification parade held by the police where the appellant was present. It was argued that the learned judge should have rejected SP7's evidence that he recognized the appellant as the person who used P3 to purchase goods on 15 January 1994. It has to be noted that the learned C judge did not brush aside what appeared to be inconsistency. She carefully examined his explanation, which was that he had panicked at the parade and that there appeared to be changes in the appellant's facial appearance; the appellant did not appear to be happy, was thin and appeared sick whereas when SP3 attended to the appellant at the shop the appellant D appeared to be energetic, happy and talkative. The learned judge was satisfied with his explanation and accepted the identification of the appellant by SP7 in court. In any event, when one considers that P3 (which was used by the appellant to pay SP7 for the goods) and P5 (the receipt for such purchases) were found on his person, it is futile for the appellant to deny that he was not the one who SP7 attended to.

E

As for the ground that the learned judge was wrong in refusing to allow the defence to have the transaction slips relating to P5 sent to the government document examiner or a private examiner for comparison of the appellant's specimen signature (to support his story that Ah Ming had used the credit card) the record shows that the learned judge allowed F defence counsel to bring the examiner to court to give evidence, it was implicit that the examiner had to compare the handwriting and then give evidence. The defence counsel in fact stated that he was not calling such a witness and closed his defence. What has to be noted is that in any event, SP7 had stated quite clearly that the appellant signed the transaction slip where the credit card P3 was used and that must surely be the best G evidence that was adduced.

The learned judge was said to have erred in rejecting the explanation of the appellant that he ran and put up a struggle before being finally arrested when the police identified themselves and approached him on the ground floor of Kedai Mun Loong because he was shocked and frightened H as the police arrived suddenly. The appellant had said he did not know why he ran away although he had not committed any offence that day. He did, however, later agree that he was running from the police because he had committed an earlier offence; he said he had been summoned for a traffic offence and he had been threatened by the traffic police that he I would be arrested and put into the lock up. The learned judge rejected his explanation. I can see nothing wrong in all the circumstances of the case in the learned judge rejecting his hollow explanation.

The learned judge was criticized for failing to give credence to the cautioned statement made by the appellant three days after his arrest (which counsel claimed meant that there was no room for afterthought

defences) which was consistent with his defence. The learned judge did refer to the cautioned statement but clearly rejected it when she rejected the defence of the appellant as not having raised any reasonable doubt on the prosecution's case on the two charges. A

The learned judge had admitted the search list made by the police inspector SP1, which shows that the credit cards P2 and P3 and the receipt P5 had been recovered from the appellant's pocket. There was an allegation that the receipt P5 had been fabricated because in a carbon copy of the police report lodged by P1 there was shown that particulars relating to P5 had been typed in later. SP1 gave an explanation that after he had typed the report he realized that he had forgotten to type in about the receipt so he typed the particulars in. The learned judge accepted his story and referred to the search list prepared by SP1 for corroboration of SP1's story on the matter. In the search list, there was a signature acknowledging receipt of the list. SP1's evidence was that it was the appellant's signature. Counsel for the defence stated that it should not have been admitted as it amounted to a confession for which no caution had been administered under s 113 of the CPC. Reliance was placed on *PP v Lim Mun Shaing* [1989] 2 CLJ 475 and *PP v Chew Yoo Choi* [1990] 2 MLJ 444. With respect, my view is that what the appellant did was to acknowledge that he had received a search list and nothing more; and I agree with the views expressed in *PP v Lee Soon Sian* [1993] 2 CLJ 214 and *PR v Ahmad bin Lateh & Anor* [1991] 1 CLJ 71. B C D E

In all the circumstances of the case, I had no reason to disturb the learned judge's findings in the case against the appellant on the first two charges. The appellant's conviction on both charges were therefore confirmed and the appeal dismissed.

As for the appeal against the sentences, the sentence on the cheating charge was three years' imprisonment and one stroke of whipping; and perhaps the learned judge may have erred on the side of leniency because the appellant had actually used a forged credit card to deceive SP7 to deliver goods to him and the maximum term of imprisonment is 10 years. An offence under s 474 of the Code attracts a maximum term of imprisonment of 20 years. To be contrasted in the circumstances of this case is that he was sentenced to five years and a fine of RM5,000 in default of one year imprisonment for an offence of being in possession of a forged credit card, a forged valuable document under s 474 of the Code and it is a proper sentence. The offence was not for the use of a forged credit card as was the case under the first charge for cheating; I do not see the sentences as excessive, let alone manifestly excessive. F G H

Order accordingly.

Reported by Tey Tsun Hang I